Supreme Court, U.S.
FILED

00 61 JUL 11 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

T.E.G./L.V.I. ENVIRONMENTAL SERVICES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES A. BOWLES
Counsel of Record
RONALD W. NOVOTNY
HILL, FARRER & BURRILL LLP
One California Plaza
300 South Grand Avenue
37th Floor
Los Angeles, CA 90071-3147
(213) 620-0460

Attorneys for Petitioner T.E.G/L.V.I. Environmental Services, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should certiorari be granted to resolve a conflict between the Circuit Courts of Appeal over whether exceptions to the National Labor Relations Board's holding in *Midland National Life Insurance*, that NLRB representation elections cannot be set aside merely on the basis of misleading representations, should be recognized when the misrepresentations are so material and fraudulent that they likely affected the result of an election?

2. Is review appropriate to determine whether the Union's material misrepresentation, to the effect that Respondent National Labor Relations Board favored Petitioner's employees in a government-conducted election, should invalidate the election results?

LIST OF INTERESTED PARTIES

The parties to this proceeding are Petitioner T.E.G./ L.V.I. Environmental Services, Inc., a California corporation, and Respondent National Labor Relations Board ("NLRB"), an agency of the United States Government.

CORPORATE DISCLOSURE STATEMENT

[Supreme Court Rule 29.6]

Petitioner T.E.G./L.V.I. Environmental Services, Inc. is a wholly-owned subsidiary of L.V.I. Holding Corp., which does not issue any shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF INTERESTED PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

CITATION TO LOWER COURT AND AGENCY OPINIONS AND ORDERS..... 1

STATEMENT OF BASIS FOR JURISDICTION..... 1

STATUTES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 9

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL OVER WHETHER EXCEPTIONS TO THE BOARD'S *MIDLAND* DOCTRINE SHOULD BE RECOGNIZED..... 9

II. REVIEW SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE UNION'S STATEMENTS THAT THE BOARD "WANTED IT TO WIN" SHOULD INVALIDATE THE RESULTS OF THE ELECTION..... 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Columbia Tanning Corp., 238 N.L.R.B. 899 (1978) 16

Contech Division, SPX Corp. v. N.L.R.B., 164 F.3d 297 (6th Cir. 1998)..... 16

Dayton Hudson Dept. Store Co. v. N.L.R.B., 79 F.3d 546 (6th Cir. 1996).....11, 18

GAF Corp., 324 NLRB 1209 (1978)..... 5

General Knit of California, Inc., 239 NLRB 619 (1978) 9

Henderson Trumbull Supply Corp. v. N.L.R.B., 501 F.2d 1224 (2nd Cir. 1974) 17

Hollywood Ceramics Company, Inc., 140 N.L.R.B. 221 (1962) 9

Maremont Corp. v. N.L.R.B., 177 F.3d 573 (6th Cir. 1999)..... 14

Midland National Life Insurance Co., 263 N.L.R.B. 127 (1982).....10, 11, 12, 13, 15, 20, 21

Monmoth Medical Center, 234 NLRB 328 (1979)..... 5

Mt. Carmel Center, 306 NLRB 1060 (1992)..... 13

N.L.R.B. v. Affiliated Midwest Hospital, Inc., 789 F.2d 524 (7th Cir. 1986)..... 10

N.L.R.B. v. Chicago Marine Containers, Inc., 745 F.2d 493 (7th Cir. 1984).....10, 20

N.L.R.B. v. Gooch Packing Company, 457 F.2d 361 (5th Cir. 1972)..... 17

N.L.R.B. v. Gormac Custom Manufacturing, Inc., 190 F.3d 742 (6th Cir. 1999)..... 18

TABLE OF AUTHORITIES – Continued

Page

N.L.R.B. v. Hub Plastics, Inc., 52 F.3d 608 (6th Cir. 1995) 11

N.L.R.B. v. Hyatt Hotels, Inc., 887 F.2d 109 (6th Cir. 1989) 16

N.L.R.B. v. Monark Boat Co., 713 F.2d 355 (8th Cir. 1983) 12

N.L.R.B. v. New Columbus Nursing Home, Inc., 720 F.2d 726 (1st Cir. 1983) 11

N.L.R.B. v. Semco Printing Center, Inc., 721 F.2d 886 (2nd Cir. 1983) 12

N.L.R.B. v. St. Francis Healthcare Centre, 212 F.3d 945 (6th Cir. 2000) 18

North of Market Senior Services, Inc. v. N.L.R.B., 204 F.3d 1163 (D.C. Cir. 2000) 14

Renco Electronics, Inc., 330 NLRB No. 52 (1999) ...16, 20

SDC Investments, 274 NLRB 556 (1985) 7

Shopping Kart Food Mart, Inc., 228 NLRB 1311 (1977) 9

St. Margaret Memorial Hospital v. N.L.R.B., 991 F.2d 1146 (3rd Cir. 1993) 12

Timsco, Inc. v. N.L.R.B., 819 F.2d 1173 (D.C. Cir. 1987) 18

Uniroyal Technology Corp. v. N.L.R.B., 98 F.3d 993 (7th Cir. 1996) 12

U.S. Ecology, Inc. v. N.L.R.B., 772 F.2d 1478 (9th Cir. 1985) 12

Van Dorn Plastic Machinery Co. v. N.L.R.B., 736 F.2d 343 (6th Cir. 1984) 11, 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 157 1

29 U.S.C. § 158 2

29 U.S.C. § 159 2

29 U.S.C. § 160(f) 8

Supreme Court Rule 10(a) 12, 20

OTHER AUTHORITIES

Sixty-Third Annual Report of the National Labor Relations Board (1998) 13

CITATION TO LOWER COURT AND AGENCY OPINIONS AND ORDERS

The NLRB's Orders which are the subject of this proceeding are reported at 326 NLRB No. 160 (1998) and 328 NLRB No. 69 (1999), and are attached hereto as Appendices II and III. The Court of Appeal's unpublished judgment filed March 10, 2000 is attached as Appendix I, and its Orders denying Petitioner's petitions for rehearing and for a rehearing en banc dated April 17, 2000 are attached as Appendices IV and V, respectively.

STATEMENT OF BASIS FOR JURISDICTION

Following the Court of Appeal's denial of Petitioner's petition for review of the NLRB's orders by its judgment of March 10, 2000, Petitioner filed petitions for rehearing and for a rehearing en banc which were both denied on April 17, 2000. Petitioner proceeds on the basis of 28 U.S.C. § 1254(1), which confers jurisdiction on this Court to review by writ of certiorari the judgment of the District of Columbia Circuit Court of Appeals. This petition is timely pursuant to Supreme Court Rule 13.3, which permits a petition for writ of certiorari to be filed within ninety (90) days after the denial of a petition for rehearing.

STATUTES INVOLVED IN THE CASE

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8 of the NLRA, 29 U.S.C. § 158:

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

Section 9 of the NLRA, 29 U.S.C § 159:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer

and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

Petitioner T.E.G./L.V.I. Environmental Services, Inc. is an asbestos abatement contractor doing business in Southern California. On January 23, 1998, a representation petition was filed with the NLRB by Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers International Union of North America, AFL-CIO ("Laborers Local 882") and International Association of Heat and Frost Insulators and Asbestos Workers Union, Local No. 5, AFL-CIO ("I.A.H.F., Local No. 5"), whereby these unions sought to jointly represent Petitioner's employees for the purpose of collective bargaining. (*See* Appendix, hereafter "App.," at p. 6).

On March 5 and 6, 1998 an election was conducted by the NLRB pursuant to a Stipulated Election Agreement at locations in Los Angeles and San Diego, California. (App. p. 3). The final revised tally of ballots showed that of 358 eligible voters, 97 cast ballots for, and 87 cast ballots against, the Union, with 7 challenged ballots. (App. p. 3).

On March 12, 1998, Petitioner filed an objection to the conduct of the election based on the Union's circulation of an "Urgent Notice" to its employees within the critical

pre-election period, which informed the employees that the NLRB favored the unions and wanted them to "win the election." (*See* Court of Appeals Appendix, hereafter "CA App.," at pp. 54-57). The flyer, written in Spanish and entitled "URGENT NOTICE" printed in bold black letters, stated (in further bold, capital letters) that "THE NATIONAL LABOR RELATIONS BOARD OF THE UNITED STATES OF AMERICA WANTS THE WORKERS OF T.E.G./L.V.I. ENVIRONMENTAL SERVICES TO HAVE A UNION." (App. p. 4). The second paragraph of the flyer further stated that "The National Labor Relations Board of the United States of America ordered that an election should take place between the worker [sic] of T.E.G./L.V.I. Environmental Services, Inc., *so that they can finally vote for their Union . . .* " (Emphasis supplied). (App. p. 6, n.3).[1]

Union Business Manager Humberto Gomez admitted at the hearing on Petitioners' objections that he was the author of the flyer and that he directed another Union member, Rafael Orellana, to mail the flyer between February 6 and 11, 1998. (CA App. p. 19; RT, pp. 78, 111, 117). It is unclear how long before the March 5 and 6 election

---

[1] The flyer was printed on plain paper and contained no letterhead. (CA App. pp. 19, 168). The flyer did not state that it was sent by the Union; rather, it was signed by the "Workers Organizing Committee of TEG/LVI Environmental Inc." (CA App. pp. 168-169). It is undisputed that the employees of TEG/LVI are mostly Spanish-speaking immigrants with a general educational level of sixth grade. (CA App. pp. 6, 40; Reporter's Transcript of NLRB Hearing on Petitioner's Objections ["RT"], pp. 17-18).

dates that the employees in Los Angeles and San Diego received the flyer.

The NLRB Regional Office held a hearing on the objection of T.E.G./L.V.I. to the conduct of the election on April 14 and 15, 1998, and the hearing officer issued his Report and Recommendations on May 8, 1998. (CA App. pp. 15-26). The hearing officer initially acknowledged that "As a general rule, it is objectionable conduct to give the impression that the Board supports either party to the election," citing *Monmouth Medical Center*, 234 NLRB 328 (1979) and *GAF Corp.*, 324 NLRB 1209 (1978). (CA App. p. 22). But he nevertheless reasoned that Petitioner's employees, "mostly immigrants from Mexico, El Salvador, and Nicaragua," could determine that the flyer's statement that the NLRB favored the Union was "merely propaganda which the employees can evaluate for themselves," and recommended that Petitioner's objection to the conduct of the election be overruled and that the certification of representative be issued to the Union. (CA App. pp. 19, 22, 25-26).

On May 21, 1998 Petitioner filed with the NLRB exceptions to the Hearing Officer's Report and Recommendations and a supporting brief. (CA App. pp. 27-38). On September 30, 1998, the Board, by a 2 to 1 vote, with Member Peter Hurtgen dissenting, issued its Decision and Certification of Representative, reported at 326 NLRB No. 160. (*See* App. at pp. 3-10). The two-member majority adopted the hearing officer's finding that the Union did not engage in objectionable conduct in mailing the employees the flyer containing the statement that "The National Labor Relations Board of the United States

wants the workers of T.E.G./L.V.I. Environmental Services to have a union." (App. p. 4). Like the hearing officer, the Board majority reasoned that the employees, despite their immigrant status and unfamiliarity with United States labor laws, were capable of evaluating the Union's propaganda for themselves in determining whether the Union's statement that the NLRB favored the Union was true. (App., p. 4).

Board Member Hurtgen issued a well-reasoned and compelling dissent concluding that the election should be set aside based on the Union's misconduct in telling the employees that "The National Labor Relations Board wants the workers of [the Petitioner] to have a union." Member Hurtgen noted that "The unit employees are mostly immigrants from Latin America, and the flyer was in Spanish." (App. p. 8). He concluded that the NLRB must find the Union's conduct objectionable because it undermined the integrity of the NLRB election process, stating:

> "I think it is highly inappropriate for a party to an election to falsely represent to employees that the NLRB favors one side or the other. Although it is inappropriate in any context, it is especially reprehensible where, as here, the employees are immigrants who are particularly vulnerable to misrepresentations about our Nation's laws. Further, the misrepresentation is unlike that found nonobjectionable in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). This misrepresentation goes to the heart of the integrity of the process, i.e., the neutrality of the Agency that is conducting the election.

> "My colleagues assert that there is no harm because there is no confusion about the fact that the Union was the party who prepared and distributed the document. My colleagues thereby miss the point. *The vice lies not in confusion about the identity of the preparer of the document. The vice lies in the message itself. We simply cannot tolerate conduct which falsely informs employees that the NLRB favors one side over the other.*"

(Emphasis added) (App. p. 8).[2] Member Hurtgen further concluded that:

> "[T]his case involves the Board's most precious values – integrity and impartiality. Where, as here, a party undermines these values, particularly in a message to a vulnerable employee group, I would conclude that the laboratory conditions [for conducting the election] have been sullied. The most important aspect of the laboratory condition is the impartiality and integrity of the Agency that is in charge of the laboratory."

(App. pp. 9-10).

---

[2] In distinguishing the case of *SDC Investments*, 274 NLRB 556, 557 (1985), on which the Board majority relied, Member Hurtgen reasoned that the objectionable flyer was not one which the employees would reasonably have construed as mere propaganda, because it "*expressly state[d] that the NLRB wants the employees to vote for the Union.*" (App., p. 9; emphasis in original). Member Hurtgen further reasoned that the mere fact that the Union was the sender of that message did not make it ambiguous, and that it therefore could not be dismissed as something that most employees would likely ignore as mere campaign rhetoric. *Id.*

In order to challenge the validity of the NLRB's Decision and Certification of Representative, Petitioner refused to bargain with the Union. (CA App. pp. 50-53). The Union then filed unfair labor practice charges on January 8, 1999 and February 24, 1999, alleging that Petitioner violated Sections 8(a)(1) and (5) of the NLRA by refusing to bargain with it. (App. p. 11). The NLRB's General Counsel issued a Consolidated Complaint on March 17, 1999, which Petitioner answered on March 22, 1999. (CA App. pp. 43, 50-60). The NLRB subsequently filed a Motion for Summary Judgment based on its prior Decision reported at 326 NLRB No. 160, and on May 24, 1999 the NLRB issued its Decision and Order granting that motion. (App. pp. 12-16).

On June 14, 1999, Petitioner sought review of the Board's decisions and orders overruling its objections to the conduct of the election and certifying the Union as the bargaining representative of its employees, by filing a petition for review of those orders with the Court of Appeals for the District of Columbia Circuit pursuant to Section 10(f) of the NLRA, 29 U.S.C. § 160(f). On July 12, 1999, the NLRB cross-petitioned for enforcement of its orders. By its judgment filed March 10, 2000, the Court of Appeals granted the Board's petition for enforcement and denied Petitioner's petition for review. (App. pp. 1-2). Petitions for a rehearing and for a rehearing en banc were subsequently filed by Petitioner, and were denied by the Court on April 17, 2000. (App. pp. 24-25).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL OVER WHETHER EXCEPTIONS TO THE BOARD'S *MIDLAND* DOCTRINE SHOULD BE RECOGNIZED.

For a period of twenty years, the NLRB vacillated four separate times over the standard to be used in determining the effect of a party's campaign misrepresentations on the validity of Board-conducted elections. Initially, in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224 (1962), the Board permitted representation elections to be set aside if there was a misrepresentation of material fact "involving a substantial departure from the truth" which was communicated shortly before the election and involved facts about which the employees were not in a position to know the truth. The Board subsequently overruled this decision in *Shopping Kart Food Mart, Inc.*, 228 NLRB 1311, 1313 (1977), in which the Board stated that it would "no longer probe into the truth or falsity of the parties' campaign statements" but would instead intervene only "in instances where a party is engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." The following year, however, the Board overturned *Shopping Kart* and reinstated the *Hollywood Ceramics* standard in *General Knit of California, Inc.*, 239 NLRB 619 (1978). It reversed itself

yet again, however, in *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 133 (1982) (hereinafter "*Midland*"), in which it once again held that the Board will intervene

> only when the misrepresentation involves the use of an 'official Board document [which] has been altered in such a way as to indicate an endorsement by the Board of a party to the election,' or 'forged documents which render voters unable to recognize propaganda for what it is.'

See N.L.R.B. v. Chicago Marine Containers, Inc., 745 F.2d 493, 497 (7th Cir. 1984); *N.L.R.B. v. Affiliated Midwest Hospital, Inc.*, 789 F.2d 524, 528-29 (7th Cir. 1986) (recounting history of the Board's flip-flopping over the standard to apply in determining the effect of misrepresentations on the validity of Board elections).

Given the long-lasting struggle that the Board has itself experienced in arriving at the proper standard to be applied in determining the effect of a party's campaign misrepresentations on Board-conducted elections, the Circuit Courts of Appeal have understandably had some hesitancy in blindly applying the *Midland* standard.[3] The

---

[3] Indeed, *Midland* did not even escape criticism from two of the five members of the NLRB who decided the case at the time. Dissenting Members Fanning and Jenkins thus stated that: "For the second time in five years, a bare majority of the Board has abandoned the flexible and balanced . . . standard for determining when election campaign misrepresentations have overstepped the bounds of tolerability and substituted an ultra-permissive standard that places a premium on the well-timed use of deception, trickery and fraud. . . . The majority [has] create[d] an irrebuttable presumption that employees can

First and Sixth Circuits have in fact repudiated the Board's inflexible approach and have decided that there must be exceptions to the *Midland* doctrine where the deception is sufficiently material, fraudulent, or artful to affect the outcome of the election. As the Sixth Circuit reasoned in *Van Dorn Plastic Machinery Co. v. N.L.R.B.*, 736 F.2d 343, 348 (6th Cir. 1984):

> "[t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and deception so artful that employees will be unable to separate truth from untruth and where their right to a fair and free election will be affected."

In accord: *see N.L.R.B. v. Hub Plastics, Inc.*, 52 F.3d 608, 611-612 (6th Cir. 1995); *Dayton Hudson Dept. Store Co. v. N.L.R.B.*, 79 F.3d 546, 549 (6th Cir. 1996).

The First Circuit in *N.L.R.B. v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983), also held that there must be exceptions to the *Midland* doctrine, stating:

> "Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under

---

recognize all misrepresentations, however opaque and deceptive." These dissenting members further concluded that employees' free choice in elections, which is the "only reason [the agency runs] elections," would necessarily be inhibited, distorted, and frustrated by the new rule. *Midland, supra*, 263 NLRB at 133-34.

> *Midland*, upon certifying the results of a fraudulent election might constitute legal error."

The Seventh Circuit has also intimated that it too might consider setting aside NLRB-conducted elections on grounds other than those stated in the *Midland* standard. *See Uniroyal Technology Corp. v. N.L.R.B.*, 98 F.3d 993, 1003 (7th Cir. 1996). Other Courts of Appeal, however, have unhesitatingly applied the *Midland* doctrine, sometimes without any discussion at all. *See Van Dorn, supra*, 736 F.2d at 348, and cases cited therein; *N.L.R.B. v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2nd Cir. 1983); *N.L.R.B. v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983); *U.S. Ecology, Inc. v. N.L.R.B.*, 772 F.2d 1478, 1481 (9th Cir. 1985). The courts themselves have accordingly recognized the tension between some circuits' wholesale adoption of the *Midland* doctrine, and the exceptions carved out by the First and Sixth Circuits noted above. *See St. Margaret Memorial Hospital v. N.L.R.B.*, 991 F.2d 1146, 1158 (3rd Cir. 1993). A direct conflict in the decisions of the United States Courts of Appeals on an important federal question therefore clearly exists within the meaning of Supreme Court Rule 10(a), justifying certiorari by this Court to resolve.

Granting review in this matter would provide the NLRB and the parties to Board-conducted elections with much-needed guidance as to whether the exceptions to the *Midland* doctrine recognized by the First and Sixth Circuits should be recognized, or whether some other standard should be developed for determining the validity of Board-conducted elections in the face of the kind of blatant campaign misrepresentations which were made

in the instant case.[4] There is every good reason for these two circuit courts to have refused to wholeheartedly embrace the *Midland* rule, given the overly deleterious effects that a party's misrepresentations during an election campaign can have on the election process. Indeed, these courts have implicitly recognized that misleading and fraudulent campaign propaganda can affect an election to a much greater extent than forged documents, which the *Midland* doctrine expressly recognizes as a ground for invalidation of an election.[5] These Circuit Courts have also more realistically chosen to recognize the *Midland* doctrine for what it is: as merely a convenient tool for sweeping under the rug serious abuses of election procedures by the parties, thereby reducing the Board's workload in resolving these important issues. This Court should not countenance such a practice which affects the representation rights of millions of American workers based on the mere convenience to a government agency,

---

[4] In 1998, the NLRB conducted 3,795 representation elections, with 217,595 employees casting ballots. (*Sixty-Third Annual Report of the National Labor Relations Board* (1998), p. 12).

[5] *See Mt. Carmel Center*, 306 NLRB 1060 (1992) (finding that an employer's use of an altered union financial form, falsely stating the income of a union's executive secretary, constituted a sufficient ground for overturning an election won by the employer by over 100 votes); *see also Midland, supra*, 263 NLRB at 134 (Members Fanning and Jenkins dissenting), expressing puzzlement at the distinction between "forgery, which [the Board] will regulate, and other kinds of fraud, which it will not."

and should grant review in this case to resolve the important issue of whether overly serious and deceptive misrepresentations of the Board's election process justify the invalidation of the results of an NLRB election.

II.

REVIEW SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE UNION'S STATEMENTS THAT THE BOARD "WANTED IT TO WIN" SHOULD INVALIDATE THE RESULTS OF THE ELECTION

Irrespective of whether the Court decides to take this case based on the foregoing conflict in the circuit courts, review should nevertheless be granted to determine whether the Union's fraudulently misleading flyer so destroyed the "laboratory conditions" for conducting NLRB elections that it "compromised the integrity of the election." *See North of Market Senior Services, Inc. v. N.L.R.B.*, 204 F.3d 1163, 1168 (D.C. Cir. 2000); *Maremont Corp. v. N.L.R.B.*, 177 F.3d 573, 577 (6th Cir. 1999). As the Seventh Circuit stated in the latter case,

> "Congress has vested the Board with considerable discretion in supervising and regulating representation elections." *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 180 (6th Cir. 1967). In an effort to 'assure employees the greatest freedom of choice in the selection of their representatives,' the Board strives to conduct representation elections 'in an atmosphere in which employees are free from pressure, coercion, and undue influence from either the employer or the union.' Id. When a party's pre-election conduct unduly influences the result of an election, 'the

> Board has set aside such election and ordered a new one.' " Id.

By its over-reliance on the *Midland* doctrine, the Board therefore sometimes evades its duty to police the laboratory conditions of the elections it conducts, and improperly delegates the task of keeping the election process clean to the parties themselves. This result augurs not only for a limitation of the *Midland* rule in appropriate cases, but also the invalidation of the election results in this case.

In this regard, the overly pernicious effect of the Union's misleading and fraudulent flyer on the Petitioner's immigrant work force cannot be gainsaid. It is only reasonable and logical to conclude that Petitioner's employees, 97% of whom are from Mexico, El Salvador and Nicaragua, were likely to be misled by statements to the effect that the United States Government "wanted them to have a union" and to "vote for" the Union in the election – particularly in view of the fact that they came from countries in which powerful government-sponsored unions have historically existed.[6] The Board has in fact overturned union victories in very similar circumstances in which misrepresentations were made to employees

---

[6] As the hearing on Petitioner's objections established, these employees are day laborers who earn between $7 and $10 per hour, and are not required to have any formal education or training other than completing a brief training program in asbestos removal. (RT 15, 17-18). As previously mentioned, these workers also only generally have a sixth grade education from their home countries, which even the Union's business agent conceded was not the same as a sixth grade education in the United States. (RT 16-17, 64, 133-34).

"who were recent immigrants and who in all likelihood were not familiar with the complexities" of our government's labor laws. *See Columbia Tanning Corp.*, 238 NLRB 899, 900 (1978). Indeed, in sustaining the employer's objection and setting aside the election in that case, the Board flatly acknowledged that "no participant in a Board election should be permitted to suggest either directly or indirectly to the voters that this government agency endorses a particular choice." *Id.* at 899-900.

In denying T.E.G./L.V.I.'s petition for review of the Board's orders, the Court of Appeals thus improperly relied on the fact that the record was "devoid of evidence in support of the employer's assertions regarding the adverse effects of the controverted flyer" in this instance. (App. p. 2). Instead of specifically requiring the presentation of such evidence, the Board has only required that the losing party establish that the improper conduct "may have affected the outcome of the election" in order to invalidate it. *See Renco Electronics, Inc.*, 330 NLRB No. 52 (1999). The appellate courts, following suit, have further held that direct proof that an employer's workers were actually intimidated or misled by a party's conduct is unnecessary, and have merely inquired into whether the alleged misconduct was "reasonably likely to interfere with the employees' free choice . . . " *See Contech Division, SPX Corp. v. N.L.R.B.*, 164 F.3d 297, 306 (6th Cir. 1998); *N.L.R.B. v. Hyatt Hotels, Inc.*, 887 F.2d 109, 112 (6th Cir. 1989) (relevant inquiry is into whether a party's conduct had a "tendency to mislead" the voters in the election).

The Court of Appeals' reliance on the absence of any evidence that the Union's flyer actually affected how any of any of Petitioner's employees voted in the election is

also misplaced because it would have been completely impractical and likely illegal for Petitioner to have presented it. Because the Board conducts secret ballot elections and the workers' freedom to cast a ballot either for or against a labor organization in confidence is inviolate, it would have been completely improper to have paraded a group of Petitioner's employees before the hearing officer and interrogated them as to whether and to what extent the misleading flyer actually affected their vote.[7] The Court of Appeals' suggestion that Petitioner could have submitted such evidence in this instance is therefore completely inimical to the very process by which NLRB elections are conducted, and has never been required or even suggested by the Board or any other court.

The appellate court also failed to take into account the closeness of the election in determining the validity of the Petitioner's objection to the Union's campaign flyer. It is well settled that in "close vote election situations the Board is required to particularly and carefully scrutinize charges which in other cases would constitute immaterial or unsubstantial objections." *See N.L.R.B. v. Gooch Packing Company*, 457 F.2d 361, 362 (5th Cir. 1972); *Henderson Trumbull Supply Corp. v. N.L.R.B.*, 501 F.2d 1224, 1230 (2nd Cir. 1974) (holding that "When, as here, an election is extremely close, even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election"). The closeness of the employee

---

[7] Indeed, it is most unlikely that the Board would have ever even permitted such an inquiry to occur, and the agency is invited to confirm this fact in its brief in response to this petition.

vote has even been cited by the District of Columbia Circuit in other cases as a factor in determining whether objectionable conduct should invalidate an election. *See Timsco, Inc. v. N.L.R.B.*, 819 F.2d 1173, 1180 (D.C. Cir. 1987); *see also N.L.R.B. v. Gormac Custom Manufacturing, Inc.*, 190 F.3d 742, 747 (6th Cir. 1999); *N.L.R.B. v. St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000) (holding that the Board abused its discretion in refusing to grant an evidentiary hearing on an objection based in part on the relatively close results of an election, with 68 employees voting for the union and 61 voting against the union with six challenged ballots); *cf. Dayton Hudson Department Store Co. v. N.L.R.B., supra*, 79 F.3d at 551 (union's large margin of victory cited as one reason for upholding NLRB's overruling of employer's objection). The fact that the Union won by only ten votes (with seven challenged ballots) out of a work force of 358 eligible employees in this case should accordingly also have been considered in determining the impact of its blatantly untrue flyer on validity of the election.[8]

Notwithstanding Petitioner's arguments before both the Board and the Court of Appeals, the appellate court also failed to consider the potentially severe negative effects its decision could have on the parties' conduct in

---

[8] In this respect, since only slightly more than half of Petitioner's employees who were eligible to vote even cast ballots in the election, it is reasonable to infer that one likely effect of the Unions' flyer was to dissuade some of Petitioner's employees from voting, particularly in view of the Union's statement to them that the Board was conducting the election as a mere formality so that the workers "could finally vote for their Union."

future Board elections. If the Union's unscrupulous tactics in this case are to receive countenance by both the agency and the courts under the *Midland* rule, then the business and labor communities can only expect that even more corrupt and improper conduct will be engaged in by parties to election campaigns without running any risk at all that such conduct will affect the validity of the election results. Examples of such "artful deception" might include:

> (1) an employer introducing an imposter at a gathering of employees as the NLRB Regional Director, who urges the employees to vote against a union in the election in order to enable the company to stay afloat financially in a competitive industry;
>
> (2) a letter to employees stating that because certain unfair labor practices have been filed against one of the parties, the Board considers that party to be a law violator and its actions before the agency (in either filing or responding to a representation election petition) are "not well received"; and
>
> (3) a flyer sent to the employees' homes by a union stating that a specific Board agent will be conducting the election and "wants you to vote for the union."

As "offensive and unethical" (in the words of Board Member Hurtgen) as all of this conduct would clearly be, it would be permissible under the ruling in this case. Accordingly, if the Board's decision in this matter (published at 326 NLRB No. 160) is allowed to stand, a new standard for chicanery and misleading tactics will be condoned, with unforseen effects on the freedom of

American workers to freely choose their collective bargaining representatives under the Board's election process.

Neither the Board, the reviewing courts, or this Court should permit the Union's misconduct in this case to go unremedied or to invite the foregoing effects to occur. Indeed, even under the *Midland* standard, the courts have upheld results of elections only when a party's statements "do not suggest either directly or indirectly that the Board endorsed a particular choice in the election [or] otherwise impugn the Board's processes." *See N.L.R.B. v. Chicago Marine Containers, Inc. supra,* 745 F.2d at 498. The Board itself has in fact recently invalidated elections in which a Board interpreter asked employees "do you know where to put your 'Yes' vote?" – conduct which bears no meaningful distinction from the Union's flyer stating that the Board "wants the employees to vote for the Union" in the election in this case. *See Renco Electronics, Inc., supra,* 330 NLRB No. 152. Thus, even under the Board's *Midland* rule as it presently exists, the Court of Appeal's decision "so far departs from the accepted and usual course of judicial proceedings" and rule of law that it calls for the exercise of this Court's supervisory power under Supreme Court Rule 10(a), and certiorari should be granted on this additional ground.

CONCLUSION

Certiorari should be granted in this case to resolve the conflict between the Circuit Courts of Appeal over whether, and to what extent, any exceptions to the

Board's decision in *Midland National Life Insurance* should be recognized. The varying standards adopted by the First and Sixth Circuits for reviewing the impact of a party's misrepresentations in Board-conducted elections, and those set by the other Circuit Courts which have adopted the *Midland* rule in full, create confusion to both employers and unions regarding what kind of conduct they can legitimately engage in to attempt to persuade eligible employees on how they should vote in such elections. Review should also be granted to correct the Board's and the Court of Appeals' refusal to invalidate the results of an election won by the Union by only ten votes in a workforce comprised of over 350 uneducated immigrant workers, under circumstances in which it is reasonable to conclude that the Union's fraudulent campaign propaganda actually did mislead the workers to "vote for the union" as the flyer told them that the government agency "wanted them" to do.

Dated: July 10, 2000

Respectfully submitted,

JAMES A. BOWLES
Counsel of Record
RONALD W. NOVOTNY
HILL, FARRER & BURRILL LLP
300 South Grand Avenue
37th Floor
Los Angeles, CA 90071-3147
(213) 620-0460

Attorneys for Petitioner
T.E.G/L.V.I. Environmental Services, Inc.

APPENDIX TABLE OF CONTENTS

Appendix I	Unpublished Judgment of the United States Court of Appeals for the District of Columbia Circuit dated March 10, 2000	App. 1-2
Appendix II	Decision of the National Labor Relations Board reported at 326 NLRB No. 160 (1998)	App. 3-10
Appendix III	Decision of the National Labor Relations Board reported at 328 NLRB No. 69 (1999)	App. 11-23
Appendix IV	Order of the U.S. Court of Appeal for the D.C. Circuit dated April 17, 2000, denying the petition for rehearing	App. 24
Appendix V	Order of the U.S. Court of Appeal for the D.C. Circuit dated April 17, 2000, denying the petition for rehearing en banc	App. 25

APPENDIX I

Bills of cost must be filed within fifteen days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1227 **September Term, 1999**

T.E.G./L.V.I. Environmental Services, Inc.

Petitioner/Cross-Respondent

v.

National Labor Relations Board,

Respondent/Cross-Petitioner

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

---

Before: WILLIAMS, ROGERS, and GARLAND, *Circuit Judges.*

JUDGMENT

(Filed Mar. 10, 2000)

This petition for review and cross-application for enforcement of a decision and order of the National Labor Relations Board (NLRB or "the Board") was heard

before the court and briefed by counsel. The court has accorded the issues full consideration and has determined that they occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED and **ADJUDGED** that the petition for review by T.E.G./L.V.I. Environmental Services, Inc. ("the employer") is denied, and that the cross-application for enforcement by the NLRB is granted. On the basis of the record before the court in this case, we cannot find unreasonable the Board's finding that the employer violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5), by refusing to bargain with the union. Even were we to apply the standard urged by the employer, *see, e.g., Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984), we could not overturn the Board when the record is devoid of evidence in support of the employer's assertions regarding the adverse effects of the controverted flyer. Nor is *North of Mkt. Senior Servs. v. NLRB*, No. 99-1178, slip op. (D.C. Cir. Mar. 2000), to the contrary, because there the alleged misconduct was attributable to the Board's agent.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Deputy Clerk

APPENDIX II

NOTICE: This opinion is subject to formal revision before publication on the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board. Washington, D.C. 20370, of any typographical or other formal errors so that corrections can be included in the bound volumes.

TEG/LVI Environmental Services, Inc. *and* Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers International Union of North America, AFL-CIO; and International Association of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO, Petitioner. Case 21-RC-19889

[326 NLRB No. 160]

September 30, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 5 and 6, 1998, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 97 for and 87 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.[1]

---

[1] The original tally of ballots showed 94 for and 79 against, with 58 challenged ballots. The parties subsequently stipulated that 40 of the challenged ballots should be sustained and 11 of the challenged ballots should be opened and counted.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

We adopt the hearing officer's finding that the Union did not engage in objectionable conduct by mailing to employees a flyer containing the following statement: "The National Labor Relations Board of the United States of America wants the workers of TEG/LVI environmental services to have a union." As the hearing officer found, the document did not purport to be an official Board document, but rather was clearly identified as one distributed by the Union. Thus, the employees would know that the document emanated from a party and was merely propaganda. The Board has long held that employees are capable of evaluating propaganda for themselves. *SDC Investments*, 274 NLRB 556, 557 (1985).

Our dissenting colleague argues that the Union's conduct is objectionable because it constitutes a misrepresentation about U.S. labor law. It is well settled, however, that misrepresentations as to law are treated in the same manner as other misrepresentations. *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983).[2] The Board will not

---

Thereafter, the revised tally of ballots was completed and served on the parties.

[2] Our colleague asserts that the Union's conduct is especially reprehensible because "the employees are immigrants who are particularly vulnerable to misrepresentations about our nation's laws." Throughout the period that the Act has been in effect, the nation's work force has included a substantial number of immigrant workers who have fully participated in elections conducted by this Agency.

set aside an election based on the misrepresentation contained in campaign propaganda. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

Our colleague nevertheless contends that the flyer is objectionable because it "falsely informs employees that the NLRB favors one side over the other." Even though the Union is clearly identified as the preparer of the document, he would find the misrepresentation objectionable because the flyer makes a misrepresentation about the neutrality of the NLRB. Thus, it is apparent that our dissenting colleague urges an exception to the well-settled *Midland* doctrine. As the Board has held, however, there is no principled reason for applying a different standard to the flyer at issue here than the Board applies to misstatements contained in campaign propaganda.

Riveredge Hospital, 264 NLRB 1094 (1982), expressly treats misstatements about Board neutrality the same as other misrepresentations. In that case, the Board found that a union's misrepresentation concerning the issuance of an unfair labor practice complaint against the employer was not objectionable. The Board's rationale, however, went beyond the specific misrepresentation and considered the union's conduct in the broader context of statements that call into question the Board's neutrality in an election. In finding that such statements did not warrant setting aside an election, the Board characterized

---

We see no basis for concluding here that immigrant employees should be considered less capable than other employees of evaluating campaign propaganda for what it is. See generally *London's Farm Dairy*, 323 NLRB No. 126, slip op. at 2 (June 20, 1997) (standard for conducting mail ballot election not different for work force of immigrant workers).

such conduct as "only one party's representation of the Board's action," and stated that "[t]he Board's actions speak for themselves, and will show up *any* misrepresentation for what it is." [Emphasis added.] *Riveredge Hospital*, supra at 1095. Finally, the Board stated, "we see no sound reason why misrepresentations of Board action should be on their face objectionable or be treated differently than other misrepresentations." Id. Contrary to our colleague, we find this rationale directly applicable to the instant circumstances. Accordingly, we shall overrule the Employer's objection.[3]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers International Union of North America, AFL-CIO; and International Association of Heat & Frost Insulators & Asbestos Workers Union. Local No. 5, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

---

[3] In adopting the hearing officer's findings that the flyer was not objectionable, we find no merit to the employer's contention that the hearing officer relied on an inaccurate translation of another portion of the document from Spanish to English. Moreover, even accepting the Employer's translation of that portion, such a statement, i.e., "The National Labor Relations Board of the United States of America ordered that an election will take place between all of the workers at TEG/LVI Environmental Services, so that they can finally vote for their union . . . " would not be objectionable for the reason set forth above.

All full-time and regular part-time truck drivers, fire proofers, working foremen, maintenance mechanics, demolition and environmental employees employed by TEG/LVI Environmental Services, Inc. and all employees of LVI Environmental Services, Inc. ("LVI" and jointly as "the Employer") during the referenced payroll period employed in these categories [sic], and including but not limited to workers involved in site mobilization, initial site cleanup, site preparation, removal of asbestos-containing material and toxic waste employed by the employer in the 12 counties of Southern California (Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Barbara Island, San Clemente Island, Santa Rose Island, Anacapia Island and the Channel Islands Monument); excluding estimators, operations managers, inventory and control employees, sales employees, project engineers, contracts administrators health and safety officers, professional employees, office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. September 30, 1998

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HURTGEN, dissenting.

I conclude that the election should be set aside. The Union told employees in a flyer that "The National Labor Relations Board of the United States of America wants the workers of [the Employer] to have a union." The unit employees are mostly immigrants from Latin America, and the flyer was in Spanish.

I think it highly inappropriate for a party to an election to falsely represent to employees that the NLRB favors one side or the other. Although it is inappropriate in any context, it is especially reprehensible where, as here, the employees are immigrants who are particularly vulnerable to misrepresentations about our Nation's laws. Further, the misrepresentation is unlike the kind found nonobjectionable in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). This misrepresentation goes to the heart of the integrity of the process, i.e., the neutrality of the Agency that is conducting the election.

My colleagues assert that there is no harm because there is no confusion about the fact that the Union was the party who prepared and distributed the document. My colleagues thereby miss the point. The vice lies not in confusion about the identity of the preparer of the document. The vice lies in the message itself. We simply cannot tolerate conduct which falsely informs employees that the NLRB favors one side over the other.

SDC Investment, 274 NLRB 556, 557 (1985), is consistent with the above analysis. In that case, the Union reproduced a blank NLRB ballot and wrote at the bottom: "Remember to vote Yes on December 16." The Board held that employees might be misled to believe that the Board

prepared the document. Thus, employees could reasonably believe that the board wanted a "yes" vote. However, the Board also made it clear that a different result would have obtained if the employees could have gleaned from the document that it was prepared by the union.

I agree with *SDC*. If the message is simply to vote for the union, and the employees realize that the message comes from the union, there is no harm. Employees would not reasonably think that *the NLRB* wants a pro-union vote. However, the instant case is different. *The document expressly states that the NLRB wants the employees to vote for the union.* The fact that the Union is the sender of that message does not make this message ambiguous.

Riveredge Hospital, 264 NLRB 1096 (182), is clearly distinguishable. In that case, the misrepresentation was that the U.S. Government had issued a complaint against the company. The truth was that the U.S. Government (i.e., the General Counsel of the NLRB) had *not* issued a complaint. The union had filed a charge, and the matter was settled with a nonadmission clause. The Board held that the misrepresentation was not objectionable. However, unlike the instant case, *Riveredge* does not involve a misrepresentation that the NLRB favors one side over the other.

In sum, this case involves the Board's most precious values – integrity and impartiality. Where, as here, a party undermines these values, particularly in a message to a vulnerable employee group, I would conclude that the laboratory conditions have been sullied. The most

important aspect of the laboratory condition is the impartiality and integrity of the Agency that is in charge of the laboratory.

Dated, Washington, D.C. September 30, 1998

Peter J. Hurtgen, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX III

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

TEG/LVI Environmental Services, Inc. *and* Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers' International Union of North America, AFL-CIO. Cases 21-CA-33118 and 21-CA33195

[328 NLRB No. 69]

May 24, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to charges filed on January 8 and February 24, 1999, respectively, the General Counsel of the National Labor Relations Board issued a consolidated complaint on March 17, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations act by refusing the Union's request to bargain following the certification of Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers' International Union of North America, AFL-CIO (Local 882) and International Association of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO (Local 5) (or collectively the Unions) in Case 21-RC-19889.[1] (Official notice is taken of the "record" in the

---

[1] 326 NLRB No. 160 (1998).

representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and submitting affirmative defenses.

On April 8, 1999, the General Counsel filed a Motion for Summary Judgment. On April 13, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent denies that it is refusing to bargain and to furnish information that is relevant and necessary to the Union's role as bargaining representative,[2] and attacks the validity of the certification on the

---

[2] While the Respondent's answer denies a refusal to bargain, the General Counsel has submitted a copy of its letter of October 20, 1998, to the business manager of Local 882, which clearly states that it "declines your request for bargaining" on the basis of its disagreement with the Board's decision certifying the Unions. Further and contrary to the Respondent, we find that there is a request for bargaining from the jointly certified Unions. Thus, the General Counsel has submitted a copy of the October 16, 1998 letter to the Respondent from the business manager of Local 882, which clearly requests a meeting to negotiate "a Collective Bargaining Agreement between [the Respondent] and Laborers' International Union of North America, AFL-CIO, Local Union 882, and the International Association of Heat & Frost Insulators & Asbestos Workers

basis of its objections to the Unions' preelection conduct in the representation proceedings.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[3] We

---

Union, Local 5." In the absence of any evidence indicating this letter had a contrary purpose, we find that one jointly certified union can make a bargaining demand in the name of the jointly certified unions. See *U.S. Pipe & Foundry Co.*, 247 NLRB 139, 142 (1980) ("It has been well settled that where there were joint bargaining entities, be they employers or unions, the Board has treated them as a single de jure entity, and the conduct . . . of one is imputed to the other.")

[3] In its answer to the complaint, the Respondent denied the appropriateness of the unit. By entering into a Stipulated election Agreement in the underlying representation proceeding, however, the Respondent agreed that the unit is appropriate for purposes of collective bargaining. Accordingly, the Respondent may not litigate that issue in this proceeding. See, *e.g.*, *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992).

In its response to the Notice to Show Cause, the Respondent contends that the "certified bargaining unit no longer exists." Specifically, the Respondent states the certified unit includes employees of the Respondent. TEG/LVI Environmental Services, Inc., and employees of LVI Environmental Services, Inc., but that the latter entity "no longer performs work or has employees in the geographic area described in the certification." Based on this alleged change in circumstances since the February 9, 1998 approval of the Stipulated Election Agreement, the Respondent requests that a hearing be held to determine the appropriateness of the unit.

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are not factual issues warranting a hearing regarding the Unions' request for information. The complaint alleges, and the Respondent denies, that the Unions requested the following information from the Respondent on January 25, 1999:[4]

1. List of current employees containing the names, addresses, job classifications, rates of pay and telephone numbers if any.

2. List of present job locations including site addresses.

We deny the Respondent's request. Absent newly discovered evidence or special circumstances, the Board is warranted in determining the unit to be appropriate on the basis of the parties' Stipulated Election Agreement. See *Telemundo De Puerto Rico v. NLRB*, 113 F.3d 270, 277-278 (1st Cir. 1997). Here, the Respondent does not even claim that the alleged cessation of operations by LVI Environmental Services, Inc. constitutes newly discovered evidence. In fact, the Respondent has failed to state specifically when this alleged change occurred and has failed to explain why it was first brought to the Board's attention in the Respondent's response to the Notice to Show Cause. Furthermore, it is well established that a reduction in the size of a bargaining unit does not constitute special circumstances. See *NLRB v. Mr. B. IGA*, 677 F.2d 32, 34 (8th Cir. 1982). Accordingly, the Respondent's contentions raise no material issues of fact requiring a hearing.

[4] A copy of the January 25, 1999 letter from the business manager Local 882 to the Respondent's counsel is attached to the General Counsel's motion. The Respondent does not claim that it did not receive the letter.

3. Production bonus information including amount/percent payable per job conclusion, on a monthly or yearly basis.

4. Medical plan insurance, 401(K), and/or profit sharing information including pamphlets/brochures.

For the reasons set out in footnote 2, supra, we find that the Respondent's denial that the Unions requested this information does not raise an issue warranting a hearing. Further, it is well established, that such information is presumptively relevant and necessary for bargaining inasmuch as the request relates to wages, hours, and terms and conditions of employment of the unit employees. The Respondent's denial of its relevance, without more, does not raise an issue warranting a hearing. See *Verona Dyestuff Division*, 233 NLRB 109, 110 (1977). Accordingly, we grant the Motion for Summary Judgment.[5]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with its main office located at 109 South Reyes Avenue, Rancho Dominguez, California, has been

---

[5] Member Hurtgen dissented from the certification in the underlying representation case. However, he agrees that the Respondent has not presented anything new here which warrants denial of a bargaining order. Accordingly, for institutional reasons, he joins in this decision.

engaged in the nonretail business of environmental cleanup services and fireproofing in the State of California. During the calendar year 1998, the Respondent, in conducting its business operations described above, purchased and received at its California locations goods valued in excess of $50,000 from other enterprises within the State of California, each of which other enterprises had received these goods directly from points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the act and that Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers' International Union of North America, AFL-CIO and International Association of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.[6]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held March 5 and 6, 1998, the Unions were certified on September 30, 1998, as the exclusive collective-bargaining representatives of the employees in the following appropriate unit:

---

[6] In its answer to the complaint, the Respondent denied the labor organization status of both Local 882 and Local 5. By entering into a Stipulated Election Agreement in the underlying representation proceeding, however, the Respondent agreed that the Unions are labor organizations. Accordingly, it is precluded from challenging that status in this case. *Biewer Wisconsin Saw Mill*, 306 NLRB 732 fn. 1 (1992).

> All full-time and regular part-time drivers, fire proofers, working foremen, maintenance mechanics, demolition and environmental employees employed by TEG/LVI Environmental Services, Inc. and all employees of LVI Environmental Services, Inc. ("LVI" and jointly as "the Employer") during the referenced payroll period employed in these categories [sic], and including but not limited to workers involved in site mobilization, initial site cleanup, site preparation, removal of asbestos-containing material and toxic waste employed by the Employer in the 12 counties of Southern California (Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Barbara Island, San Clemente Island, Santa Rosa Island, Anacapa Island and the Channel Islands Monument); excluding estimators, operations managers, inventory and control employees, sales employees, project engineers, contracts administrators, health and safety officers, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The Unions continue to be the exclusive representatives under section 9(a) of the Act.

B. Refusal to Bargain

Since October 16, 1998, the Unions, by letter, have requested the Respondent to bargain, and, since October 20, 1998, the Respondent has refused. Since January 25,

1999, the Unions, by letter, have requested the Respondent to furnish information, and, since that date, the Respondent has refused. We find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By refusing on and after October 20, 1998, to bargain with the Unions as the exclusive collective-bargaining representatives of employees in the appropriate unit and by refusing on and after January 25, 1999, to furnish the Unions requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Unions, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Unions the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB

226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, TEG/LVI Environmental Services, Inc., Rancho Dominguez, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers' International Union of North America, AFL-CIO and International Association of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO, the joint representative, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Unions information that is relevant and necessary to their role as the joint exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Unions as the joint exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers, fire proofers, working foremen, maintenance mechanics, demolition and environmental employees employed by TEG/LVI Environmental Services, Inc. and all employees of LVI Environmental Services, Inc. ("LVI" and jointly as "the Employer") during the referenced payroll period employed in these categories [sic], and including but not limited to workers involved in site mobilization, initial site cleanup, site preparation, removal of asbestos-containing material and toxic waste employed by the Employer in the 12 counties of Southern California (Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Barbara Island, San Clemente Island, Santa Rose Island, Anacapa Island and the Channel Islands Monument); excluding estimators, operations managers, inventory and control employees, sales employees, project engineers, contracts administrators, health and safety officers, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Furnish the Unions information they requested on October 16, 1998.

(c) Within 14 days after service by the Region, post at its facility in Rancho Dominguez, California, copies of

the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 20, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

---

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 24, 1999

Sarah M. Fox, Member

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers' International Union of North America, AFL-CIO and International Association of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO, as the joint exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Unions information that is relevant and necessary to its role as the joint exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Unions and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time drivers, fire proofers, working foremen, maintenance mechanics, demolition and environmental employees employed by TEG/LVI Environmental Services, Inc. and all employees of LVI Environmental Services, Inc. ("LVI" and jointly as "the Employer") during the referenced payroll period employed in these categories [sic], and including but not limited to workers involved in site mobilization, initial site cleanup, site preparation, removal of asbestos-containing material and toxic waste employed by us in the 12 counties of Southern California (Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Barbara Island, San Clemente Island, Santa Rose Island, Anacapa Island and the Channel Islands Monument); excluding estimators, operations managers, inventory and control employees, sales employees, project engineers, contracts administrators, health and safety officers, professional employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL furnish the Unions the information they requested on October 16, 1998.

TEG/LVI ENVIRONMENTAL SERVICES, INC.

APPENDIX IV

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1227 **September Term, 1999**

T.E.G./L.V.I. Environmental Services, Inc.

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Williams, Rogers, and Garland, Circuit Judges.

ORDER

(Filed Apr. 17, 2000)

Upon consideration of petitioner's petition for rehearing filed March 31, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX V

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1227 **September Term, 1999**

T.E.G./L.V.I. Environmental Services, Inc.

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

(Filed Apr. 17, 2000)

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk